

# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CACR08-1102

MICHAEL SHANE WILMOTH  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered** MAY 27, 2009

APPEAL FROM THE BENTON COUNTY  
CIRCUIT COURT,  
[NO. CR2007-1651-1]

HONORABLE TOM KEITH, JUDGE

AFFIRMED

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**M. MICHAEL KINARD, Judge**

Appellant, Michael Shane Wilmoth, appeals from his conviction on a charge of delivery of a controlled substance. We affirm.

Prior to the trial, counsel for appellant filed a motion to withdraw, citing a conflict caused by appellant filing a complaint against his counsel and the Arkansas Public Defender Commission. The trial court denied the motion. Also prior to trial, appellant filed a *pro se* motion for new counsel, alleging that his trial counsel was ineffective. The trial court likewise denied appellant's motion. During the trial, Jerrod Crabtree, an undercover police officer with the Benton County Sheriff's Department, testified that on October 12, 2007, appellant attempted to sell him approximately four pounds of marijuana for \$1000. Jennifer Salkill, a confidential informant for the Benton County Sheriff's Department, testified that she contacted appellant concerning the proposed sale of the marijuana on the morning of October 12, 2007. She testified that she dropped appellant off at his home after he told her that the

marijuana was there, and that she later picked him up and drove him to the location where he sold the marijuana to Crabtree.

Appellant admitted being involved in the transaction at issue. He testified that Salkill came to him and asked him to obtain methamphetamines for her. He stated that, after he refused, she began crying and saying that she was not going to be able to pay her bills. He further testified that he drove with her to a field where they picked marijuana, which Salkill then took with her. According to appellant, Salkill later contacted him and asked him to sell the marijuana for her so that her children's father would not take her children from her. Appellant admitted selling the marijuana to Officer Crabtree. Following the guilt phase of the trial, the jury found appellant guilty of delivery of a controlled substance. The jury sentenced appellant to twenty-five years' imprisonment in the Arkansas Department of Correction as a habitual offender. This timely appeal followed.

Appellant raises four points on appeal. The first two points center on appellant's counsel at trial. Appellant first argues that the trial court erred in denying his trial counsel's motion to withdraw and his motion for new counsel. A trial court's decision to deny a motion by counsel to withdraw will not be reversed unless there has been an abuse of discretion. *Townsend v. State*, 350 Ark. 129, 85 S.W.3d 526 (2002). In addition, a defendant must show that prejudice resulted from the denial of the motion to withdraw. *Id.* In this case, appellant's trial counsel filed a motion to withdraw on the basis that there was a conflict generated by appellant's filing of a complaint against trial counsel. We hold that there has

been no abuse of discretion by the trial court on this point, nor has there been a showing of prejudice.

Appellant filed a complaint against his trial counsel, in part, because the trial counsel declined to pursue a defense of entrapment. The complaint also references evidentiary decisions by trial counsel with which appellant disagreed. Trial counsel contended in his motion to withdraw that a conflict existed because of the complaint that was filed. However, prejudice is not presumed simply because a criminal defendant has filed a complaint against his attorney. See *Townsend, supra*. In this case, there was no showing by appellant's trial counsel that he was unable to adequately represent appellant as a result of the complaint. There is no indication that trial counsel altered his representation in any way due to the complaint, as the defense put on by the trial counsel had by all appearances been crafted prior to the filing of the complaint. Therefore, there was no abuse of discretion by the trial court in denying the motion to withdraw, because there was no conflict demonstrated between appellant and his trial counsel and appellant failed to demonstrate any prejudice resulting from the denial of the motion.

Appellant's second point on appeal is that his trial counsel was ineffective, and that the trial court erred in denying his motion for new counsel. The State argues in its brief that appellant failed to preserve his ineffective-assistance-of-counsel argument for appeal. We agree. It is well settled that appellate courts will not consider ineffective-assistance-of-counsel arguments on direct appeal unless that issue has been considered by the trial court. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). Additionally, the facts surrounding the claim

must be fully developed, either during the trial or during hearings conducted by the trial court. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). The reason for this rule is that an evidentiary hearing as to the competency of appellant's counsel by the trial court better equips the appellate court on review to examine the sufficiency of the representation. *Id.* The trial court is in a better position to assess the quality of legal representation than an appellate court on appeal. *Id.*

In this case, the trial court never ruled on whether appellant's counsel was effective or not. In fact, the only instance in which the effectiveness of appellant's counsel was made an issue prior to this appeal was appellant's motion for new counsel, which was denied by the trial court without comment as to the performance of appellant's trial counsel. In addition, appellant has not filed a petition for post-conviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure, so there was never any separate hearing on the issue by the trial court subsequent to trial. We hold that, under these circumstances, the issue of the effectiveness of appellant's trial counsel was not sufficiently developed below; therefore, we decline to address the issue on appeal.

Regarding the denial of appellant's motion for new counsel, the denial of a motion for new counsel is reviewed under an abuse of discretion standard. *Edwards v. State*, 321 Ark. 610, 906 S.W.3d 310 (1995). Because, as discussed above, there was no conflict demonstrated between appellant and his trial counsel, we hold that the trial court did not abuse its discretion in denying appellant's motion for new counsel.

Appellant's third argument on appeal is that the trial court erred in not allowing his counsel to impeach Salkill, who was called as a witness by appellant. Arkansas Rule of Evidence 609 allows prior felony convictions to be used to impeach the credibility of a witness. In addition, Arkansas Rule of Evidence 607 allows any party to attack the credibility of a witness, even the party who called the witness. While questioning Salkill on direct examination, counsel for appellant asked her if she had any prior felony convictions, and she responded affirmatively. The trial court ruled that counsel for appellant could not ask Salkill any additional questions regarding prior convictions because Salkill had not been deemed a "hostile" witness. We do not find any support in the case law for the trial court's assertion that the witness must be deemed hostile before his or her credibility can be impeached by use of prior convictions. Given that Rule 607 plainly states that a party calling a witness may impeach the credibility of a witness, we hold that the trial court erred in stopping the line of questioning on this basis.

However, we also hold that this error does not require reversal, because appellant failed to demonstrate any prejudice resulting from the error. Appellant obtained an admission from Salkill that she had prior felony convictions. Her answer was not struck from the record. Appellant has not indicated any additional relevant information that he hoped to obtain from Salkill through additional questioning regarding her criminal history. In addition, Salkill's credibility was not vital to appellant's defense because appellant admitted his involvement on the stand and he did not pursue an actual entrapment defense. As appellant has failed to

demonstrate any prejudice resulting from the trial court's error, we decline to reverse on this point.

Appellant's final point on appeal is that the trial court erred in allowing the State to introduce evidence that the State had previously stipulated it would not introduce. We note that appellant cites *DuBois v. State*, 254 Ark. 543, 494 S.W.2d 700 (1973), for the proposition that stipulations are binding in criminal trials. However, our reading of *DuBois* does not reveal that the case stands for that proposition. We find that appellant's argument on this point is without merit. In a pre-trial hearing, the State stipulated that it would not introduce evidence regarding the marijuana on the front porch of the home. The State did not produce the evidence during the guilt phase of the trial. However, the record does not reveal that the State stipulated that it would not produce the evidence during the sentencing phase of the trial. Sentencing is, in essence, a trial in and of itself, in which new evidence may be submitted. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). Also, our supreme court has stated that the State should not be precluded from introducing relevant evidence in a sentencing proceeding in the absence of prejudice. *Id.* Appellant has failed to demonstrate how he was prejudiced by the evidence that was introduced. Therefore, we hold that the ruling of the trial court was proper.

Affirmed.

HART and GLADWIN, JJ., agree.